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Supreme Court of the United States

October Term, 1956

No. 40

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ETC.,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD AND LANNOM MANUFACTURING COMPANY.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinions in the Court of Appeals (R. 13-22) are reported at 226 F. 2d 194.

Jurisdiction

The order of the Court of Appeals was entered October 6, 1955 (R. 12). On December 19, 1955, by order of Mr. Justice Reed, the time to file a petition for a writ of certiorari was extended to March 3, 1956 (R. 85). The petition was filed March 1 and was granted on April 23 (R. 85). The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

Questions Presented

1. Whether a labor organization may be retroactively deprived of its compliance status under the Labor Management Relations Act, 1947 because one of its officers was convicted, in 1954, of having filed, in 1950, a false affidavit under section 9(h) of the Act.

2. If so, whether the loss of compliance may be carried into 1952, when the union's compliance status was based upon a later affidavit, filed in 1951, which was not the subject of indictment or conviction.

3. Whether, even if the answers to both of the foregoing questions are affirmative, such decompliance may be effectuated while the conviction on the 1950 affidavit is still on appeal and the appeal presents substantial questions.

4. Whether the court below was not required to give effect to a judgment of the district court for the District of Columbia, entered in an action between the union and the Board, and affirmed by the Court of Appeals for that circuit, that the union's compliance status was not affected by the conviction.

Statute Involved

29 U. S. C. § 159(h) [Labor Management Relations Act, 1947, section 9(h)] provides:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the

preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illlegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

Statement

The order under review (R. 12), one judge dissenting, dismissed the petition of the National Labor Relations Board (R. 29-30) for enforcement of its unfair labor practice order (R. 22-29) against the respondent Lannom Manufacturing Company. The order of dismissal did not reach the merits of the Board's order; its basis was that the charging union, International Fur and Leather Workers Union (hereafter referred to as Fur and Leather), had retroactively lost its compliance status under the Labor Management Relations Act, 1947 (hereafter called the Act) because its former president, Ben Gold, had been convicted, in 1954, under 18 U. S. C. § 1001 of having filed a false non-Communist affidavit in 1950.

Petitioner is the successor by merger to Fur and Leather, the merger having been effectuated in February, 1955, after submission of the case below.

1. Fur and Leather's Compliance.

Prior to its merger with Amalgamated, Fur and Leather was an international union to which were affiliated many local unions throughout the United States. Until 1954, Ben Gold had been its president for many years (R. 10).

Since 1950 Fur and Leather had required its officers, as a condition of holding union office, to file annually, in accordance with the compliance provisions of the Act, the non-Communist affidavits provided by section 9(h) thereof. Such affidavits are effective to maintain "compliance" for one year. Annually in 1950, 1951, 1952, 1953 and 1954 these affidavits were filed by each of its officers, including Gold, and the union's compliance was continuous (R. 10).

2. The Unfair Labor Practices.

Early in 1951 Lannom discharged a number of its employees who were then attempting to organize and join a local affiliated to Fur and Leather. On charges duly filed by Fur and Leather (R. 42-46), the Board, on February 27, 1952, issued its complaint against Lannom (R. 38-41). After hearings, the Board, on March 20, 1953, issued a Decision and Order in which it found Lannom guilty of restraint and coercion of its employees in the exercise of their right to self-organization. It thereupon ordered Lannom to reinstate twenty-four workers who, it found, had been unlawfully discharged or laid off, and to cease and desist from its unfair labor practices and to post notices (R. 22-29).

3. Gold's Subsequent Indictment and Conviction.

Thereafter, in August, 1953, Gold was indicted on a charge that his 1950 affidavit was false. The indictment did not put in issue the truthfulness of the 1951, 1952 or 1953 affidavits which he had filed before the indictment and on which Fur and Leather's subsequent compliance status (and particularly its status on February 27, 1952, the date when the Board issued its complaint) was based (R. 10, 21-22).

Gold was convicted on April 30, 1954 and sentenced to one to three years. The trial court continued Gold on the same bail pending appeal, ruling that the case pre-

sented substantial issues of law and fact warranting review. An appeal to the Court of Appeals for the District of Columbia was immediately taken and the case was pending undetermined in that court at the time of the decision below (R. 20).[1]

4. The Litigation in the District of Columbia Concerning the Effect of the Indictment and Conviction Upon the Union's Compliance Status.

As a result of previous events, commencing in December, 1952, involving accusations that Gold's affidavits were false (R. 4-5), the Board, on three separate occasions, had sought to declare Fur and Leather out of compliance. In a series of resulting actions by Fur and Leather against the Board, the district court and the Court of Appeals for the District of Columbia, on each such occasion, had enjoined the Board from impairing the union's compliance status on the ground of the falsity of the affidavits, holding that the sanction against a false affidavit was a criminal one against the offending officer, not decompliance of the Union.

In *Fur and Leather Union* v. *Herzog,* 110 F. Supp. 220 (D. C., D. Col.), affd. sub nom. *Farmer* v. *Fur and Leather Union,* 211 F. 2d 36 (D. Col. Cir.) cert. den. 347 U. S. 943, the Board was permanently enjoined (R. 14) from conducting an inquiry into the truth or falsity of the Gold affidavits. Subsequently, in *Fur and Leather Union* v. *Farmer,*

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[1] Oral argument on the *Gold* appeal had been had before a panel of the court on March 28, 1955. After the order below had been made the court, on January 12, 1956, *sua sponte* set the *Gold* appeal down for rehearing *in banc* on February 9. On March 19, it affirmed the conviction by a vote of 4-4, each judge reserving the right to file a statement of his vote and his reasons. Judge Bazelon is the only judge thus far to have filed a statement; his statement shows he voted for an acquittal. A petition for a writ of certiorari to review this affirmance is now pending undetermined before this Court (No. 137, this Term).

117 F. Supp. 35 (D. C., D. Col.), stay den. Dec. 4, 1953 (No. 12347, C. A., D. Col.) cert. den. 347 U. S. 943, the Board was enjoined from impairing or suspending the union's compliance status as a result of Gold's indictment (R. 14-15). And in *Fur and Leather Union* v. *Farmer*, 34 LRRM 2493 (not officially reported) (D. C., D. Col.), affd. 221 F. 2d 862 (D. Col. Cir.), the same court, on July 23, 1954, further enjoined the Board from impairing the union's compliance status on account of Gold's conviction. This injunction (R. 8-12) was in full effect at the time of the proceedings in the Sixth Circuit, as that court acknowledged (R. 15). Nevertheless, it refused to give effect to the injunction on the ground that it disagreed with it (R. 16).

5. The Proceedings and the Ruling Below.

In obedience to the injunction, the Board filed the present enforcement petition (R. 29-30) on September 10, 1954 (R. 3). Lannom thereupon moved to dismiss, asserting that Fur and Leather was not in compliance on the grounds that the falsity of Gold's affidavit had been "continuously" "well known to all the members of the Labor Board, as well as to the general membership of the charging union" from the time it was filed, and that Gold had since been "convicted of perjury" (R. 1).[2] The Union was granted intervention for the purpose of opposing the motion to dismiss (R. 2-3).

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[2] Lannom had also sought to litigate the truthfulness of the affidavits at the unfair labor practice hearings (R. 6-7, 31-37). The Courts of Appeals which have considered this question, including the Sixth Circuit, are unanimous that this is improper. In addition to the cases in the District of Columbia circuit cited *infra* pp. 11, 12, see also *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917 (6th Cir.); *National Labor Relations Board* v. *Sharples Chemical Co.*, 209 F. 2d 645 (6th Cir.); *National Labor Relations Board* v. *Vulcan Furniture Mfg. Co.*, 217 F. 2d 369 (5th Cir.); *National Labor Relations Board* v. *Puerto Rico Food Prod. Corp.*, 232 F. 2d 515, 519-520 (1st Cir.). Cf. *National Labor Relations Board* v. *Coca Cola Bottling Company of Louisville, Inc.*, 350 U. S. 264.

The order under review sustained Lannom's motion, the majority holding that (1) the several rulings on the question by the Court of Appeals for the District of Columbia were wrong (226 F. 2nd, at p. 196, R. 16); (2) "irrespective of a possible lack of authority in the Board • • • to investigate the truth or falsity of affidavits filed with it," the court had the authority to determine non-compliance "where a factual issue was not involved" (*id.*, at p. 197, R. 17, 18); (3) a factual issue was not involved as to the falsity of either the 1950 or 1951 affidavits, except one "technical at its best", in view of "the nature and fundamental characteristics of the Communist Party" (*id.*, at 198, R. 19); therefore, "as a matter of law" Gold's membership as of February 27, 1952 (the date of issuance of the Board's complaint) was established "in the absence of a showing to the contrary" by the jury's verdict that he was a member on August 30, 1950 (*id.*, at p. 198, R. 19); (4) the pendency of Gold's appeal is immaterial[3] (*id.*, at p. 199, R. 20).

Judge Stewart dissented on the ground that the union's compliance status in February, 1952 was not based on Gold's 1950 affidavit but on his affidavit filed in August, 1951, which was not shown to be false (*id.*, at pp. 199-200, R. 21-22).

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[3] The majority said on this: "This case is complicated by the fact that an appeal on the part of Gold is pending in the Court of Appeals for the District of Columbia from the judgment of the District Court. It is indefinite when that litigation will end, considering the possibility of further proceedings in the Supreme Court in the event of affirmance, and the possibility of a new trial in the event of reversal. We realize that the ultimate termination of the criminal proceedings in the District of Columbia may present a different factual situation from what is now before us, but consider it inadvisable to 'freeze' this proceeding for an unreasonable length of time awaiting such termination, which would in the meantime prevent a possible review by the Supreme Court if so desired by one of the parties. We are accordingly ruling on the motion on the basis of the record as it presently stands."

Summary of Argument

I.

A. There is nether express nor implied power to punish a union by "decompliance" because one of its officers has been convicted of having filed a false non-Communist affidavit. Congress carefully considered various alternative sanctions (including the sanction of union decompliance) against the possibility that false affidavits might be filed under § 9(h), and then decided that the sole sanction for filing a false non-Communist affidavit should be punishment of the affiant, not victimization of the union or of its members. It therefore specifically rejected union decompliance as a practical or suitable sanction.

The Board's original administrative interpretation of the Act consistently repudiated the notion of any inherent power in this area and its rules and regulations still make the fact of filing, not the truth or falsity of the affidavit, the sole test of compliance.

The Board does not have "inherent power" to determine the conditions for compliance. This does not concern quasi-judicial or administrative functions within the Board's purview, such as the appropriateness of a bargaining unit, or of a remedy for unfair labor structures. Congress has not left it to the Board to fix the conditions for the right of access to the Board's processes; it has fixed them itself and has given the Board only the function of determining whether those conditions have been met.

By the enactment of the Communist Control Act of 1954, the Congress has reiterated its view that the Board is to have nothing to do with decompliance. By this legislation Congress established with clarity and preciseness the exclusive conditions and procedures for the decompliance of a union. This pre-emption of the field pre-

cludes any other cause or method of decompliance, and especially excludes a retroactive decompliance.

The retroactive decompliance of a union because of the later-discovered falsity of an affidavit of one of its officers is potentially disastrous to the stability of labor relations. Contracts covering tens of thousands of workers were entered into by Fur and Leather and by its affiliated and constituted bodies on the basis of its then current compliance status. In larger unions contracts covering hundreds of thousands of workers would be involved. If a union's compliance is to be taken away retroactively, years later, because of the after-discovered misconduct of one of its officers, all of its certifications are vitiated and its contracts, if they provide for union security, have, retroactively, become unlawful. The disruptive effect of such a construction is apparent.

B. The ruling below is based upon a hostage theory of justice. Under it, twenty-four workers in Tennessee who sought to join a union of which all of the officers had, under penalty of severe criminal sanctions, sworn to the non-Communist affidavits and which had a certificate of compliance from the National Labor Relations Board, are suddenly penalized because, more than three years later, one of the national officers in New York has been convicted of having filed a false affidavit. Since the guilt in making a false affidavit is the affiant's, it is constitutionally impermissible to penalize the victims of Lannom's unfair labor practices because of their association with the affiant in the same union.

II.

The § 9(h) affidavit is, as a matter of constitutional necessity, in the present tense; otherwise the statute would be *ex post facto* and a bill of attainder. *American Communications Association* v. *Douds,* 339 U. S. 382, at pp. 413-4. Gold's conviction on the 1950 affidavit, upon an

indictment which did not question the validity of his 1951, 1952 or 1953 affidavits which were then on file, cannot establish the falsity of the later affidavits.

Therefore, even if union decompliance were a permissible sanction, current decompliance could not be imposed because of a false affidavit filed more than a year earlier. Such an affidavit is *functus officio* as far as a union's current compliance status is concerned. Cf. *NLRB* v. *Dant & Russell, Ltd.*, 344 U. S. 375.

III.

The court below erred in holding that the 1950 affidavit was false although the judgment of conviction was then *sub judice* in an appeal involving substantial questions. It emphasized this error by extending the assumption of falsity of the 1950 affidavit into 1952.

IV.

The decision below denied effect to a decision of a court of competent jurisdiction rendered in an action between the union and the Board, the parties directly concerned with the compliance status established and maintained and, in a sense, having its domicile within the District of Columbia, which the courts of that district, in holdings twice denied review by this Court, have held is not impaired by the falsity, real or alleged, of the affidavits.

Unless a doctrine of *res judicata* is applied, proceedings before the Board are subject to endless delays while respondents may raise issues not only concerning the falsity of the non-Communist affidavits required by section 9(h), but of the financial and other data required by section 9(f) and (g) of the Act as well.

ARGUMENT

I.

There is neither express nor implied power to "decomply" a union because one of its officers has been convicted of having filed a false non-Communist affidavit.

A. (1) Neither the government nor the court below points to any express provision of statute which authorizes the decompliance of a union because one of its officers has been convicted of having filed a false non-Communist affidavit. No provision for decompliance of a union is to be found in the Act. The Board's position, therefore, must rest, as it does, upon an asserted "implied power to protect its processes from abuse" (Brief in *NLRB* v. *International Union of Mine, Mill and Smeltor Workers,* No. 57 this Term, p. 12). But, as was pointed out in *Farmer* v. *United Electrical Workers,* 211 F. 2d 36, cert. den. 343 U. S. 943, the contention of "inherent power" to decomply because of the falsity of an affidavit is untenable because (at p. 39):

> "The scheme of § 9(h) is clear. It imposes a criminal penalty for filing a false affidavit under § 9(h), in order to deter Communist officers from filing at all; then the failure of such an officer to file is made the touchstone for barring his union from crucial benefits under the Act, as an incentive to the membership to rid itself of such leadership. There is nothing in the Act or in its legislative history or in good sense to indicate that Congress meant to go further and impose the drastic penalty of excluding the union from the Act's benefits because its officer had deceived the union as well as the Board by filing a false affidavit."

To the same effect are *Fur Workers* v. *Farmer*, 117 F. Supp. 35 (D. C., D. Col.) affd. 211 F. 2d 36 (C. A. D. Col.) cert. den. 347 U. S. 943; *Fur Workers* v. *Farmer*, 34 LRRM 2493 (D. C. D. Col.) affd. 221 F. 2d 826 (C. A. D. Col.); *International Union of Mine, Mill and Smelter Workers* v. *Farmer, et al.*, 226 F. 2d 780 (C. A. D. Col.). Cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. Col.) cert. den. 347 U. S. 968 and *National Labor Relations Board* v. *Puerto Rico Food Prod. Corp.*, 232 F. 2d 515, 519-20 (1st Cir.).

(2) The legislative history of the Act shows that Congress deliberated carefully over the sanctions to be imposed for a false affidavit. It was, of course, aware that false affidavits might be filed and it fully considered ways of investigating them and of providing sanctions therefor. It concluded that the remedy for a false affidavit should be conviction of the affiant, not punishment of the union; such a course would be "as reckless as firing a shot-gun into a crowd of people in an effort to stop one who is picking their pockets." *Farmer* v. *United Electrical Workers*, 211 F. 2d, at p. 39.

After debating various alternatives Congress decided, as stated by Senator Taft, that "an affidavit is sufficient for the Board's purposes" (*Congressional Record*, Senate, June 12, 1947, p. 7002; *2 Legislative History, Labor-Management Relations Act, 1947*, p. 1547) since "the penal provisions of section 35A of the Criminal Code [now 18 U. S. C. § 1001] * * * are made applicable to the execution of such affidavits." (*Congressional Record*, Senate, June 5, 1947, p. 6604; *2 Legislative History*, p. 1547.) Congress therefore rejected proposals which had originally been made and enacted in the House and Senate (H. R. 3020, 80th Cong., 1st Sess., *1 Legislative History*, pp. 190, 251) to make the fact of Communist leadership the test of compliance. Instead, it substituted a provision to make the fact of filing the basis of achieving the status of compliance. But it provided severe sanctions, to be administered by the

Department of Justice, against an affiant for a false filing. The last sentence of section 9(h) was amended to provide that "The provisions of Section 35A of the Criminal Code shall be applicable in respect to such affidavits" and Congress deliberately omitted from the statute any provision for the visitation of any sanction upon the union. *United Electrical Workers* v. *Herzog*, 110 F. Supp. 220, at 221 (D. C., D. Col.).

In presenting the Conference Report to the Senate, Senator Taft, the principal author of the Act, said that the criminal sanction upon the affiant had been agreed upon so that a false affidavit would not "hold up the certification of a union. But any Communist who makes a false affidavit can be sent to jail." (*Congressional Record*, Senate, June 12, 1947, p. 1627.) Answering the critics of the Act, Senator Taft pointed out that, as far as the union was concerned, it was subject to no disabilities if it elected officers who would file the affidavit. He said: "Under the amendment an affidavit is sufficient for the Board's purposes and there is no delay unless an officer of the moving union refuses to file the affidavit required" (*ibid.*, at 1625. See also *2 Legislative History*, 1542, 1547, 1627). The legislative history of the Act thus refutes a claim to inherent power to decomply.

(3) Prior to its order of December 19, 1952, (R. 4) the Board had consistently repudiated the existence of "inherent power" in this area. In *Matter of Alpert and Alpert*, 92 NLRB 806, it held that the compliance status of the West Coast Longshoremen's Union, of which Harry Bridges was President, could not be affected by his conviction of perjury for having falsely denied membership in the Communist Party. It said that:

> "In this situation, as in others already considered by the Board, persons desiring to establish falsification or fraud have recourse to the Department of Justice for a prosecution under Section 35(a) of the Criminal Code."

See also *In re Craddock-Terry Shoe Corporation,* 76 NLRB 842; *In re American Seating Company,* 85 NLRB 269; *In re Sunbeam Corp.,* 89 NLRB 469.

The Board's former chairman testified before the Senate sub-Commitee of the Committee on Labor and Public Welfare on March 18, 1952 that (italics supplied):

> "It was apparent from the outset that the NLRB's *sole* function was to make certain that the necessary persons filed these affidavits, and that, once they had done so pursuant to the rules we adopted, *we were to process their cases without inquiring into the truth or falsity of the affidavits* themselves. Where such an issue arose, the Board's *statutory duty was only to refer the affidavits to the Department of Justice* for investigation and possible prosecution for perjury under the Criminal Code. We have made 55 such referrals since 1947." *Hearings before Senate Subcommittee of the Committee on Labor and Public Welfare, Communist Domination of Unions and National Security,* p. 91.

In the same hearings the then NLRB General Counsel (George J. Bott) repeated the position stated by Chairman Herzog. Senator Humphrey, who conducted the inquiry, asked:

> "What was the intent of the Congress under your interpretation of 9(h)?"

Mr. Bott answered:

> "The intent only that the affidavits be filed and as [far as] we are concerned that the National Labor Relations Board or the General Counsel not investigate the truth or falsity of the affidavits. That is very clear" (*Hearings, ibid.,* p. 114).

See also *NLRB Fourteenth Annual Report*, p. 15; *NLRB Sixteenth Annual Report*, p. 48.

Thus the Board's Rules and Regulations make the filing of the affidavit the sole test of compliance under section 9(f). Compliance "means" filing [Board's Rules and Regulations, Series 6, as amended, Sec. 102.13] and the Board has no rules and regulations for "decompliance" of a union for a false affidavit.

(4) The questions posed by this case do not involve the exercise of the Board's quasi-judicial and administrative functions on an issue within its sphere, *e.g.*, the determination of an appropriate bargaining unit, or whether unfair labor practices have been committed and, if so, the appropriate remedy. These functions are plainly vested solely in the Board. They are, indeed, its function.

But this case involves the right of access to the Board. Congress has not vested in the Board—or in the Courts of Appeal—the right to decide who shall or shall not have access to the Board as a complying party. Congress has itself explicitly and specifically prescribed the terms for attaining a status of compliance. *National Labor Relations Board* v. *Highland Park Manufacturing Co.*, 341 U. S. 322. The Board's function in this area is therefore the administrative function of determining whether the terms fixed by Congress have been met. See *National Labor Relations Board* v. *Coca-Cola Bottling Company of Louisville, Inc.*, 350 U. S. 264. By the specific provisions of the statute, the function of administering the sanctions which Congress has provided for abuse of its terms is in the Department of Justice, not in the Board. Therefore, *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9 and the other cases cited by the Board (pp. 13, 25 *et seq.*, Brief in No. 57, *supra*) to the effect that it may decline to submit its processes to abuse, however vitality they may have in areas within the Board's function, cannot support a claim to "inherent power" in an

area where the Congress has denied it a function. For this reason also the distinction which the Board attempts to draw from such cases as *L. P. Stewart & Bro.* v. *Bowles,* 322 U. S. 398; *Porter* v. *Warner Holding Co.,* 328 U. S. 395 (at pp. 30-31, Brief in No. 57) between a "sanction" and "other appropriate remedies" has no relevance here, for the provisions and legislative history of the Act make it clear that the Congress deliberately denied to the Board the power to provide any other remedy than the criminal sanction it had itself provided.

(5) By the enactment of the Communist Control Act of 1954, Public Law 637, 83d Cong., chapter 886, 2d Sess., Congress has reiterated its desire to exclude the Board from all functions in this area and has thereby prescribed the sole means of "decompliance". Under that law, the function of determining whether a union is Communist-controlled, and whether the membership is aware of it, is vested in the Subversive Activities Control Board [Subversive Activities Control Act of 1950, as amended, Sections 7, 13A (e) (6)]. The SACB is required to act on a verified petition of the Attorney General after a hearing on notice [*ibid.*, Section 13A (a) (b) (c) (d)]. Even then, decompliance, if ordered, is never retroactive; it is prospective only and does not take effect until the SACB order has become "final" *i.e.*, only after there has been full judicial review (*ibid.*, Section 13A (b), Section 14). By this overall legislation Congress has clearly pre-empted the whole field so as to preclude any other cause or method of decompliance. *Cf. Commonwealth of Pennsylvania* v. *Nelson,* 350 U. S. 497 and also *Bindczyck* v. *Finucane,* 342 U. S. 76; *Dice* v. *Akron, Canton & Youngstown R. R. Co.,* 342 U. S. 359; *Far East Conference* v. *United States,* 342 U. S. 570; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.

(6) Furthermore, decompliance of the union is simply not a practical or a suitable sanction for conviction of an officer making a false affidavit. Under the Act, the affi-

davit has a vitality of only one year for compliance purposes. Conviction would, ordinarily, therefore occur, as here, only with regard to an affidavit which is *functus officio* for compliance purposes. Moreover, the conviction may be reversed on appeal, as the court below recognized. Cf. the reversals of convictions for false § 9(h) affidavits in *United States* v. *Valenti*, 207 F. 2d 242 (3d Cir.) and *Fisher* v. *United States*, 231 F. 2d 99 (9th Cir.).[4] As is shown in the pending petition for certiorari to review the 4-4 affirmance of Gold's conviction (No. 137, this Term) and as Judge Bazelon wrote in that case (R. 2232, No. 137) the appeal presents substantial and vital questions affecting the administration of justice. If the conviction is reversed the workers victimized by Lannom's unfair labor practices, as well as the union and all of its local unions and constituent bodies will have suffered great injury from the removal of its compliance status as the result of an erroneous conviction. And if decompliance comes only after the affirmance of the conviction, the issue is moot since the affiant thereupon goes to jail.

Moreover, the effect of decompliance in 1955 because of a false affidavit filed in 1950 is disastrous to the stability of labor relations. Contracts covering tens of thousands of workers, in hundreds of plants, were entered into by locals and constituents of the Fur and Leather Workers Union on the basis of its current compliance. In larger unions, or in the case of the AFL-CIO itself, contracts covering hundreds of thousands and even millions of

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[4] In support of its position the Board cites (Brief in No. 57, *supra*, p. 23) its action in "nullifying the union's compliance status under the Act and its outstanding certifications" because of Valenti's conviction. *In re Compliance Status of Local 80A, United Packinghouse Workers of America, CIO*, 101 NLRB 1253, and other cases cited in footnote 17 of the Board's brief. The Board does not advert to the fact that it was unable, after Valenti's conviction had been reversed, to undo the injury which it had caused the union by this unjust and unauthorized action.

workers would be involved. A union security contract with a non-complying union is unlawful and ineffective as an election bar. Act, section 8(a)(3); *In re Charles E. Hires Co.*, 85 NLRB 1208; *In re Jandel Furs*, 100 NLRB 1390; *In re San Jose Builders Co.*, 101 NLRB 1772; *In re Ward Baking Co.*, 101 NLRB 419. The Board points to nothing to show that Congress intended that if, years after the event, it were discovered that an officer of a union had deceived the union as well as the Board by a false affidavit, the union should thereupon be retroactively decomplied, and its certifications and contracts thereupon set aside and new questions concerning representation thus generated. If so, are strikes and economic sanctions which are available only to complying unions [Section 8(b)(4) (B), (C), (D); see *American Communications Association* v. *Douds*, 339 U. S. 382, 390], and which may have been engaged in by the union while in compliance, thereby rendered illegal?

Finally, the ruling below creates a powerful incentive for delay in the processing and disposition of labor board cases. If proceedings instituted on a charge by a complying union are vitiated after decision because an officer of the charging union has been subsequently convicted—in a case still on appeal—then prudence and a proper concern for the public funds should require the Board to wait until the criminal statute of limitations has run on all affidavits before it processes a case. But even this would not solve the problem for if there should be an indictment it would have to wait until there was a final judgment before it issued a complaint. And it would be wise for a Board respondent to wait, as Lannom waited, before complying with an unfair labor practice order on the chance that an officer of the charging or petitioning union may yet be indicted one, two or three years later and thereafter convicted. The question would still remain about those respondents who, in the interim have accepted the Board's

orders. Would the Board treat them less favorably than respondents who have resisted its order? Should such an employer be allowed to rescind its compliance, unreinstate its victimized workers and resume its unfair labor practices?

B. The visitation of punishment upon Fur and Leather and, more directly, upon Lannom's workers, by the ruling below imposes a hostage theory of justice which is repugnant to our laws. Since the guilt in making a false affidavit is personal to the affiant, it is constitutionally impermissible to penalize those innocent of wrongdoing merely because of their association with the affiant in the same union. See *Schneiderman* v. *United States,* 320 U. S. 118, 136; *Kotteakos* v. *United States,* 328 U. S. 750, 772; *Bridges* v. *Wixon,* 326 U. S. 135, 163 (concurring opinion of Murphy, J.).

Nor is this application of guilt by association made less repugnant by the Board's theory that the ruling "would prompt the union to keep a continuing check on its officers and to remove a Communist officer as soon as his deceit comes to light" (p. 15, Brief, No. 57, *ibid.,* see also pp. 32-33). Presumably, therefore, the Board feels that some dereliction of duty by the union or Lannom's workers is somehow involved. But a union which has adopted a policy to comply with the Act can plainly do no more than to elect officers who represent themselves as able to sign the affidavit truthfully. If the officer refuses to sign in the face of such a union policy, the union can remove him from office. If he signs, the union has the right to assume that the severe criminal sanctions will deter a false oath. As far as the Congressional policy is concerned, the union has done all that it can in making the signing of the affidavit the condition for holding office.

Any other requirement would impose an unworkable "loyalty" process upon unions which could lead to their

emasculation. The pressure would be to reject those officers who are radical, militant, progressive, leftist or even "communistic" on the theory that they would be more vulnerable to prosecution and consequently more likely to prejudice the compliance status than conservative or reactionary union officers. Should a suspicion of "communism" flow from strong wage demands, or from an advanced position on racial equity, or public ownershrip, so as to alert the union that the officer's affidavit may be false? And what about secret members of the Communist Party? Congress did not command, as the Board now proposes, that the union should "keep a continuing check [for Communist Party membership or affiliation] on its officers." It saw, if the Board does not, the ensuing disaster to a vigorous and independent labor movement if only "safe" officers could be elected. It left the policing job to the due process of the criminal law, not to suspicion, charges, rumors and hearsay.

Finally, the application of the guilt by association principle is not avoided even under the Board's proposal. Who is to keep this "continuing check";—the workers in Lannom's plant in Tennessee? What standards should they employ? Are "suspicious" circumstances which are brought to the attention of some, but not of all of the members, sufficient? Is knowledge necessary, or is reason to know—or to suspect—sufficient? Even if, in some way not disclosed by this record, Lannom's workers had reason to divine in 1952 that in 1954 Gold would be convicted of having falsely denied Communist Party membership in 1950, they had no reason to believe that he would be convicted of filing false affidavits in 1951 or 1952. In fact, he has not been. In view of the heavy criminal penalties to which Gold was exposed in filing the affidavits they would have had to assume utter irrationality to believe them false. Yet the ruling below, without adverting to their lack of participation in any wrongdoing whatever, directly penalizes them.

The ruling below—based upon express disagreement with the consistent construction of section 9(h) in a series of cases denied review by this Court—erroneously construes the statute, ignores its legislative history, threatens the stability of labor agreements and relationships and imposes serious injury upon innocent persons and organizations.

II.

Even if an implied power to decomply exists, decompliance cannot result from conviction on an expired affidavit or for a period during which the affidavit was *functus officio*.

The crucial compliance period in this case is February, 1952, when the Board's complaint issued. *National Labor Relations Board* v. *Dant*, 344 U. S. 375. On that date Fur and Leather's compliance was based, *inter alia*, upon Gold's August, 1951 affidavit, and the 1950 affidavit had then expired for compliance purposes.

The holding below is therefore erroneous, even if an inherent power to decomply exists.

I. The section 9(h) affidavit by its terms is and, constitutionally must be, in the present tense. *American Communications Association* v. *Douds*, 339 U. S. 382, 414. Therefore, as the dissent below points out (R. 21), the holding that the 1951 affidavit was false because the 1950 affidavit may be deemed false violates the premise on which the constitutionality of the Act is based. As Judge Stewart noted:

> "In *American Communications Assn.* v. *Douds*, 339 U. S. 382, 414, the opinion in chief, rejecting the claim that § 9(h) was a bill of attainder, emphasized that 'members of those groups identified in § 9(h) are free to serve as union officers if at any time they

renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position.' The conclusion reached in the prevailing opinion seems to me to impose an improper limitation upon Chief Justice Vinson's language."

If, "as a matter of law" Gold's 1951 affidavit was false because of the falsity of his 1950 affidavit [5] then section 9(h) is *ex post facto* in operation and it is a bill of attainder.

2. The 1950 affidavit, under the terms of the Act, had lost vitality for compliance purposes as of February, 1952. The ruling below thus plainly violates the Act by making the union's compliance status in 1952 hinge on a state of facts in 1950 and upon an affidavit which was then more than a year old and without further efficacy for compliance purposes.

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[5] It is true that the court qualified this by the phrase "in the absence of a showing to the contrary". But the practical effect of its ruling was to treat the conviction on the 1950 affidavit as *res judicata* for the 1951 affidavit since the determination of falsity is categorical and without notice or an opportunity to disprove it having been given. Contrary to this alleged rule of law (for which no authority is cited in the majority opinion) the standard presumption of innocence supports the conclusion that Gold's 1951 affidavit was not criminally filed.

III.

In any event it was error to decomply the union while the conviction is on appeal.

As noted, *supra,* pp. 4-5, 17, Gold's case is now on appeal in this Court. At the time of the decision below it was pending undetermined in the Court of Appeals for the District of Columbia.

Gold's appeal presents substantial issues of law and of fact (Petition for certiorari, No. 137 this Term). The trial court so certified in allowing him to remain on the same bail pending appeal; the conviction was affirmed by an evenly divided *in banc* court and the only opinion in the case was for an acquittal.

If the conviction is reversed, the decision below will have subjected the union and Lannom's employees to serious injury on account of an unjust conviction. The majority implies that if "a different factual situation" should result because of the reversal of the conviction in the pending appeal (R. 20) it would vacate its order of dismissal and consider the enforcement petition on its merits. However, in view of the importance of the matter, it considered it inadvisable "to 'freeze' this proceeding for an unreasonable length of time awaiting such termination" (R. 20). The possibility of this retroactive kind of on-again-off again-on again compliance status is a compelling argument against the ruling below. But if the court were to apply its rule that the conviction of an officer retroactively decomplies the union then, at least, it should have awaited the finality of the conviction before subjecting the union to the application of its judicial legislation.

IV.

The court below was obliged to give effect to the decisions of the District of Columbia Circuit that the union's compliance status was not impaired by the falsity, real or alleged, of the affidavits.

Under the Board's Rules and Regulations, a national or international union is required to file the affidavits necessary to establish its compliance status at the Board's office in Washington, D. C. (Rules and Regulations, Series 6, as amended, § 102.13). Thus the domicile, or a situs in the nature of domicile, of the compliance status is in the District of Columbia. Further, the District of Columbia "is the sole venue of prohibitory suits against the Board." *National Labor Relations Board* v. *Vulcan Furniture Manufacturing Co.*, 214 F. 2d 369 (5th Cir.).

In three separate actions between the union and the Board, the courts of the District of Columbia have held that the falsity, real or alleged, of Gold's affidavits, did not impair the union's compliance (R. 3-5), *supra*, pp. 5-6. In two of those actions this Court had denied review, *ibid.* The injunctions against the Board's interference with the union's compliance status were in full force at the time that the case was heard and decided below. No matter that the court did not agree with them; it had no power to deny them effect in an action between the same parties. Under familiar principles, they were *res judicata*. See *Cromwell* v. *Sac County*, 94 U. S. 351, 352; *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Pilcher Mining Company*, 325 U. S. 335, 340; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 401-2.

Unless the doctrine of *res judicata* is applied, any representation or unfair labor practice proceeding before the Board or enforcement proceeding before the courts of appeals is subject to endless delays while a respondent

raises issues not merely concerning the section 9(h) affidavits, but of the financial and other data required by sections (f) and (g) of the Act. If Lannom is free to litigate, on the issue of falsity, a status between the union and the Board, every other employer would be free to do so and not even this Court's decision would finally conclude the matter. For if Lannom is not bound, there is no reason why any other employer should be bound by Lannom's success or failure in this case. Unfair labor practice and enforcement proceedings would therefore be devoted to litigating and relitigating not whether an unfair labor practice has been committed, but whether the compliance affidavits, reports and records, past or present, are true or false; and no employer except the particular employer would ever be bound by the outcome.

In *National Labor Relations Board* v. *Coca Cola Bottling Co., supra,* p. 6, this Court held that an employer could litigate whether the requisite compliance papers had been filed. It is another matter to hold that it may litigate whether they are true. *National Labor Relations Board* v. *Puerto Rico Food Prod. Corp.,* 232 F. 2d 515, 519-520 (1st Cir.).

The Board's position in No. 57 this Term supports the argument for *res judicata.* It argues in that case that it settled the falsity issue which arose there in "a separate administrative proceeding" in a way which does "not interrupt or otherwise delay particular unfair labor practice or representation proceedings, the problem which concerned Congress in adopting the affidavit technique" (Brief in No. 57, *supra,* pp. 16-17). If a disposition of the compliance issue in a separate administrative proceeding is, as the Board argues, *res judicata* so as to bar its injection into particular proceedings, it is impossible to see why the judicial determination of the compliance status of Fur and Leather in litigation between it and the Board

in the District of Columbia circuit did not bar its injection into the particular enforcement proceedings in the Sixth Circuit in order to meet "the problem which concerned Congress in adopting the affidavit technique" (*supra*).

CONCLUSION

The order below should be reversed.

September 21, 1956.

Respectfully submitted,

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